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Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

| In the Matter of | OOCKET FILE COPY ORIGINAL | |
|---------------------------------------|---------------------------|----------------------|
| Implementation of Infrastructure |) | CC Docket No. 96-237 |
| Sharing Provisions in the |) | |
| Telecommunications Act of 1996 |) | |

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby submits these Reply Comments in response to comments filed pursuant to the Commission's Notice of Proposed Rulemaking¹ in the above referenced docket.

I. Introduction

Parties commenting in this proceeding overwhelmingly agreed that Section 259² of the Communications Act³ serves a substantially different purpose than does Section 251⁴ and that the Commission should avoid trying to reconcile the provisions of the two sections as if they have a singular goal.⁵ Rather, parties urged the Commission to acknowledge the differences in the two

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Notice of Proposed Rulemaking, FCC 96-456 (rel. Nov. 22, 1996) ("Notice").

² 47 U.S.C. § 259.

Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. ("the Act").

⁴ 47 U.S.C. § 251.

Ameritech, at 3-4; Southwestern Bell Telephone Company ("Southwestern Bell"), at 4; NYNEX Telephone Companies ("NYNEX"), at 3-11; U S West, Inc. ("US West"), at 4; Pacific Telesis Group ("Pacific"), at 5; BellSouth, at 2-5; United States Telephone Association ("USTA"), at 6-7; GTE Service Corporation ("GTE"), at 8-9; ALLTEL Telephone Services Corporation ("ALLTEL"), at 2-3; Minnesota Independent Coalition ("Minnesota"), at 1-2; Frontier Corporation ("Frontier"), at 4-5; Sprint Corporation ("Sprint"), at 1-2.

sections' objectives and to interpret Section 259 in the manner that best effectuates its purpose and without subordinating it to any other section of the Act.⁶ Parties were also in near universal agreement that the Commission need not and should not adopt extensive or specific rules to govern agreements for infrastructure sharing under Section 259. Instead, the Commission's tentative conclusion that "Section 259-derived should be largely the product of negotiation among the parties" was roundly supported.⁷

Notwithstanding the collective consensus of those parties directly affected by and subject to the requirements of Section 259, however, a few parties urged the Commission to reach beyond the clear purpose and import of this specialized section and effectively to recast it as an extension of incumbent LECs' obligations under Section 251. BellSouth addresses the contentions of these parties below.

II. Section 259 Imposes No Obligations on Incumbent LECs and Grants Qualifying LECs No Rights Beyond Those Specified in That Section

As many parties observed, Section 259 serves a narrow and unique purpose. Specifically, Section 259 provides assurance to consumers in areas served by local exchange carriers lacking necessary economies of scope or scale of their own that they (the consumers) will still be able to enjoy the benefits of advanced telecommunications services through infrastructure sharing agreements between LECs. Section 259 does not imbue "qualifying LECs" under Section 259

See, e.g., Rural Telephone Coalition ("RTC"), at 2 ("[T]he FCC, in promulgating its rules, must recognize that Section 259 has equal standing in the law with all other section and cannot be subordinated to the implementing rules of any other section or provision, most notably Section 251.").

Notice at ¶ 7. See, Ameritech, at 3; Southwestern Bell, at 1-2; NYNEX, at 12; US West, at 3; Pacific, at 4-9; BellSouth at 2; USTA, at 3-4; GTE, at 2-3; Jackson Thorton & Company ("Jackson"), at 3-4; Minnesota, at 7-10; RTC at 3.

with additional rights to enhance their competitive position in other geographic markets, nor does it obligate them to further bestow the benefits of such agreements upon carriers who do not qualify under Section 259 to receive them directly. Section 259 is also not a back door mechanism for developing modifications to standards applicable under Section 251. Finally, the Commission should not read into Section 259 an obligation that incumbent LECs provide resale opportunities to qualifying LECs. Arguments supporting such interpretations of Section 259 must be rejected.

The plain language of Section 259 contains its own statement of the limited purpose for which infrastructure sharing agreements may be entered, as well as the uses to which the shared infrastructure may be put. The language specifies that qualifying carriers¹¹ may request, and incumbent LECs must make available,

such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such

See, Association for Local Telephone Services ("ALTS"), at 2-3.

See, National Cable Television Association, Inc. ("NCTA"), at 3-7.

See, MCI Telecommunications Corporation ("MCI"), at 3-6.

Section 259(d) defines a "qualifying carrier" as "a telecommunications carrier that lacks economies of scale or scope...and offers...universal service [pursuant to Section 254]." Section 259(d) also directs the Commission to adopt regulations for determining whether a carrier lacks economies of scope or scale. The Commission's proposal in the *Notice*, *Notice* at ¶ 37, to adopt a rebuttable presumption that carriers meeting the statutory definition of "rural telephone company," 47 U.S.C. § 153(37), lack such economies received substantial support. Because the notion of "economies" is dependent on the production process at issue, BellSouth believes it inappropriate to deem any class of carriers "automatically" to be qualifying carriers, Jackson at 2-3, or to "categorically" exclude any carriers from such status, Frontier at 3.

qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e). 12

In light of this clear limitation, ALTS' assertion that "Section 259 also facilitates qualifying carriers' competitive entry outside their own territory" cannot be supported. By its own terms, Section 259 permits a qualifying LEC to request an infrastructure sharing agreement and obligates an incumbent LEC to enter such an agreement *only* for the purpose of enabling the qualifying LEC "to provide . . . services . . . in the service area in which such qualifying LEC has [been designated] an eligible telecommunications carrier under section 214(e)." Section 259 provides qualifying carriers no right to request, and imposes upon incumbent LECs no obligation to enter, an infrastructure sharing agreement to facilitate the qualifying LEC's competitive forays outside the area in which it has been designated an eligible carrier under Section 214(e).

Perhaps in recognition of the inadequacy its primary proposition, ALTS further suggests that the qualifying LEC could use Section 259 infrastructure sharing agreements to support it competitive ventures outside its service area as long as it pays for such arrangements under the pricing standards of Sections 251. Again, however, the plain meaning of Section 259(a) precludes such an interpretation. Section 259 imposes absolutely no obligation on incumbent LECs to share infrastructure under the pricing standards of Sections 251 or otherwise to substitute *any* provisions of a Section 259 agreement with provisions required for other forms of agreements.

¹² 47 U.S.C. § 259(a) (emphasis added).

¹³ ALTS at 2-3.

ALTS at 3.

Indeed, an agreement between an incumbent LEC and a LEC that would be a qualifying LEC for purposes of Section 259 is not a Section 259 agreement unless it meets all the terms of Section 259. A qualifying LEC under Section 259 cannot simply pick and choose from the provisions of Sections 251 and 259 and claim the resulting contract to be a Section 259 agreement. ALTS' attempt to extend the scope of Section 259 beyond its specified purpose by mixing its provisions with those of other sections of the Act is at odds with the express language of Section 259 and must be rejected.

Similarly, the Commission should reject NCTA's contention that qualifying carriers engaged in infrastructure sharing arrangements under Section 259 incur an obligation to extend those benefits to other carriers in their service areas pursuant to Section 251. NCTA's argument is nothing more than a back door attempt to gain access to infrastructure sharing arrangements for or by carriers whom Congress has already excluded from such entitlement. Accordingly, NCTA's argument should be rejected.

Section 259 reflects Congress's clear intent that a mechanism be in place to ensure the availability of advanced technology and services even in areas in which a serving LEC does not experience the necessary economies of scope or scale within its own operations. In establishing this mechanism, however, Congress was careful to delineate the carriers that would be permitted to obtain the benefits of shared infrastructure under the terms of Section 259. Only LECs that are "qualifying carriers" are entitled to the benefits of sharing under Section 259. Indeed, had

Of course, such a LEC may have rights to request interconnection, resale, or unbundled elements under other provisions of the Act for purposes other than those specified in Section 259, but any such resultant agreement is not a Section 259 agreement.

NCTA at 4.

Congress intended any carrier to be able to obtain Section 259 benefits, it would not have needed to establish qualifications as a precondition to such benefits. That Congress deliberately limited the class of carriers to whom incumbents are required to make available shared infrastructure confirms that Congress did not intend to permit nonqualifying carriers to request such agreements. And, what Congress obviously chose not to permit directly, the Commission must not permit indirectly under NCTA's proposal.

Moreover, NCTA misconstrues the nature of the exemption from Section 251(c) for rural telephone companies, which are likely to make up the bulk of "qualifying carriers" under Section 259. Section 251(f) exempts rural telephone companies from the requirements of Section 251(c) unless and until a state commission has determined, following appropriate inquiry, that the exemption should be terminated for a given rural telephone company. The Commission cannot by general rule or otherwise decide that rural telephone companies loses that exemption upon entering a Section 259 agreement. Accordingly, Section 251(f) stands as a bar against requiring qualifying LECs to make Section 259 shared infrastructure available to other LECs pursuant to Section 251(c).

NCTA also erroneously asserts that if a qualifying LEC is for some reason unable to provide under Section 251 the infrastructure obtained under a Section 259 sharing agreement, then the providing LEC under the Section 259 agreement should be required to satisfy the qualifying LEC's purported Section 251 obligation. As just noted, of course, a qualifying LEC is likely to be exempt from Section 251(c) and thus will have no Section 251(c) obligation that it

¹⁷ NCTA at 5.

NCTA at 5, n.19.

is unable to fill. Thus, there is no derivative obligation that even arguably could fall on the providing LEC. Moreover, even if a qualifying LEC did have a Section 251(c) obligation generally, the effect of an arrangement such as that proposed by NCTA would be to place a nonqualifying carrier in the position of a qualifying LEC for purposes of requesting infrastructure sharing — an outcome contrary to Congress's creation of a "qualifying carrier" status in the first instance. Additionally, such a requirement would effectively subject the providing carrier to treatment as a common carrier for purposes of the shared infrastructure in direct contravention of Section 259(b)(3).¹⁹ For all these reasons, NCTA's argument is insupportable and must be rejected.

The Commission also should reject MCI's dual contentions that the rules adopted to implement Section 251 should form the baseline terms available to a Section 259 qualifying carrier and that prices charged for infrastructure sharing should be less than prices established for Section 251 facilities. MCI purports to advocate these requirements to ensure that qualifying LECs have the full "negotiating advantage granted to [them] under Section 259(b)(6),"²¹ and thus are able to negotiate "terms more favorable than they would get under 251."²² MCI's true motive, however, is more transparent.

Section 259(b)(3) requires the Commission to "ensure that such [providing] local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions, made available to a qualifying carrier in accordance with regulations issued pursuant to this section." 47 U.S.C. § 259(b)(3) (emphasis added).

MCI at 3-5, 9.

MCI at 5.

²² MCI at 3.

In the first place, stringent rules are not necessary to ensure that qualifying LECs enjoy the full benefits of Section 259. Both LECs that are likely to be providing LECs and those that are likely to be qualifying LECs, as well as those likely to be both providing and qualifying LECs, agree that the Commission should refrain from imposing on noncompeting LECs rules designed for agreements between competing LECs. Parties explained that Section 259-like arrangements have been negotiated and agreed upon for years and expressed an expectation that such cooperative relationships would more likely continue if unencumbered by an overlay of regulatory requirements. Thus, there simply is no need to inflict upon a cooperative process rules developed for application in the context of negotiations between competitors.

Moreover, as MCI's comments reveal, the true thrust of MCI's position is not to ensure that qualifying carriers are able to exercise their "negotiating advantage," but to establish a mechanism for using Section 259 agreements to continually lower the Section 251 "threshold" for all other carriers. Under MCI's proposal, incumbent LEC's would be obligated to provide Section 259 agreements on terms using Section 251 requirements as the minimum threshold, but with an "expectation" that incumbent LECs provide even more favorable terms to noncompeting, qualifying LECs. Such Section 259 agreements, however, would then be used to impose even more stringent Section 251 requirements, ²³ thus drawing incumbent LECs into an ever downward spiraling set of threshold requirements. The Commission should avoid such an unwarranted result by reaffirming its past determination that Section 259 is "a limited and *discrete* provision designed

According to MCI, requiring Section 259 agreements to meet or be better than Section 251 thresholds would provide a means of reviewing "the exact degree to which 'improvements' upon the 251 threshold" could be made. MCI at 5.

to bring the benefits of advanced infrastructure to additional subscribers"²⁴ and is therefore an inappropriate tool for establishing regulatory requirements to govern competitive entry into incumbent LECs' service areas.

Finally, even among parties that generally agreed on the scope and purpose of Section 259, there was some disagreement on the nature of the infrastructure that is subject to the sharing obligation. In particular, several parties took opposing views of whether Section 259 obligates providing carriers to make services available for resale by qualifying carriers. In BellSouth's view, resale is not among the infrastructure sharing obligations of Section 259.

As several parties observed, resale of services is noticeably absent from Section 259, particularly compared to its prominent role under Section 251. Thus, as an initial matter, it is apparent that Congress deliberately excluded resale from the infrastructure sharing arrangements addressed in Section 259.

Moreover, the notion of "resale" by a qualifying carrier in its service area of a service offered by a providing carrier only in its service area is inherently inconsistent. Indeed, as Section 251(c) reflects, the concept of resale is limited to services that the incumbent LEC offers to subscribers at retail. Incumbent LECs offer these retail services in their areas of incumbency. Under Section 251, competing carriers have rights to resell those services in those same service areas. However, because a LEC does not offer retail services as an incumbent to subscribers

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45476 (rel. Aug. 8, 1996) ("Local Competition First Report and Order"), at ¶ 169 (emphasis added), partially stayed pending appeal sub nom Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir., Oct. 15, 1996).

outside its area of incumbency,²⁵ there is no service available to be resold in the qualifying LEC's service area under Section 259.

To permit a qualifying carrier to "resell" in its area a service that an incumbent LEC does not offer in that area would be to grant the reseller greater rights than the provider of the service has. Had Congress intended to extend qualifying LECs such greater resale rights than the providing LEC has in selling its service, it certainly would have been more explicit and, at a minimum, would have referred to "resale" in Section 259. Of course, Congress made no such reference. Accordingly, the Commission must not infer from the absence of a resale component in Section 259 that Congress intended to include it.

CONCLUSION

BellSouth urges the Commission to adhere to its tentative conclusion in the *Notice* to allow Section 259 arrangements to develop principally through negotiations among the parties.

To the extent the Act requires the Commission to adopt regulations, it should articulate only general rules and guidelines. The Commission should be cautious, however, not to go beyond the

Of course, an incumbent in one area may choose to enter a new area and offer the same retail services in the new area. Although that LEC would then be subject to the general resale obligation applicable to all local exchange carriers under Section 251(b), it would not be subject to Section 251(c) or Section 259 because it would not be an incumbent LEC in the new service area.

limited purpose of Section 259 to impose obligations on incumbent LECs or grant rights to qualifying LECs not found in the terms of Section 259.

Respectfully submitted,

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DATE: January 3, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of January, 1997 served the following parities to this action with a copy of the foregoing BELLSOUTH REPLY COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

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